



## City Research Online

### City, University of London Institutional Repository

---

**Citation:** Yong, A. (2020). The future of EU citizenship status during crisis – is there a role for fundamental rights protection?. *Journal of International and Comparative Law*, 7(2), pp. 471-489.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <https://openaccess.city.ac.uk/id/eprint/24551/>

**Link to published version:**

**Copyright:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

**Reuse:** Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

---

---



# *The future of EU citizenship status during crisis – is there a role for fundamental rights protection?*

Adrienne Yong\*

**Abstract:** This paper assesses whether there is a future for the status of EU citizenship and fundamental rights. It operates from the premise that rights associated with EU citizenship are inherently underlined by fundamental rights protection. The context within which this question is answered is that of the four recent “crises” faced by the EU since the Treaty of Lisbon, namely, the Eurozone, migration and rule of law crises and Brexit. These examples serve to highlight how the Court of Justice of the EU’s apparent choice not to fully integrate fundamental rights into EU citizenship case law affects the fundamentality of EU citizenship status, as it was originally hailed to be. It argues that there is a case to be made for a stronger role for fundamental rights protection as part of the future of EU citizenship’s status.

**Keywords:** EU citizenship, fundamental rights, Eurozone crisis, rule of law crisis, migration crisis, Brexit.

## I. INTRODUCTION

In the last decade of the EU’s recent history, various crises have presented challenges to a view of the EU’s future as one that imagines an ‘ever closer Union’.<sup>1</sup> One set of challenges it faces are those which affect rights under the status of EU citizenship.<sup>2</sup> This paper will assess what the future looks like for the status of EU citizenship and its relationship with fundamental rights protection specifically within the turbulent political context of crisis that has affected, and continues to affect, the EU, since the end of the 2009 when the Lisbon Treaty came into force. EU citizenship status is understood in this paper with reference to fundamental rights protection as an integral part of the status’ scope. Fundamental rights warrant greater attention since Lisbon made the Charter of Fundamental Rights binding, and the EU mandated accession to the European Convention on Human Rights (ECHR).<sup>3</sup> The “four crises” – the Eurozone, migration and rule of law crises and the UK’s withdrawal from the EU – make up the

---

\* Senior Lecturer in Law, Institute for the Study of European Laws (ISEL) at The City Law School, City, University of London, Northampton Square, London, EC1V 0HB, UK. [adrienne.yong@city.ac.uk](mailto:adrienne.yong@city.ac.uk). Dr Yong’s research interests are mostly in European Union law, specifically Union citizenship and EU fundamental rights, as well as immigration and human rights more generally. She is the Co-Director of ISEL and Managing Co-Editor of the City Law School Working Paper Series. Thanks to Veronica Shleina for research assistance and Dr Sabrina Germain, Professor Elaine Fahey (as editor of this special issue) and the anonymous reviewers for their helpful comments on an earlier draft.

<sup>1</sup> Preamble; Article 1, Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

<sup>2</sup> Article 20-21, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

<sup>3</sup> Article 6 TEU.

aforementioned turbulent political context for analysis in this paper. By analysing case law from the Court of Justice of the EU (CJEU), limitations on the scope of EU citizenship – which includes fundamental rights protection – become evident. However, accepting the premise that protection associated with EU citizenship status is inherently underlined by fundamental rights allows for a different view of the future of the status and the scope of its relevant rights.

Hypothesising how the concept of EU citizenship should develop has long been a feature of the literature and commentary on the subject, with the CJEU's interpretation of Treaty provisions determining the scope of EU citizenship status.<sup>4</sup> Initially, the discussion surrounded the relevance of EU citizenship status given that rights under the free movement of persons were almost identical to citizenship.<sup>5</sup> This paper's central argument is premised on an increasingly constitutionalised EU fundamental rights discourse being instrumental in adding flesh to bones of EU citizenship status to distinguish it from worker status.<sup>6</sup> It contextualises EU citizenship's future within the EU's increasingly complicated political atmosphere and uniquely conceives of EU citizenship as one that has always been seen as a gateway to fundamental rights protection before the CJEU. It is this particular take on EU citizenship that is in jeopardy in the recent context of the four crises.<sup>7</sup>

Shaw explains that 'at the national level, citizenship is invested with an intensity of political significance and substance, and a connection to the body politic in the broadest sense.'<sup>8</sup> On this basis, the paper will argue that over the years, this connection has been substantiated by a conferral of fundamental rights protection by the CJEU. This has become more explicitly part of the rights conferred under EU citizenship status.<sup>9</sup> The CJEU's judicial narrative appearing to link the two concepts is thus not just a normative exercise, but a decision grounded in the Treaties after Lisbon constitutionalised the EU fundamental rights discourse. This reasoning forms the basis of how conclusions are reached on the future of EU citizenship status in this political context. By adopting this contextual approach to case law analysis, this paper explains why restrictive trends in the context of the four crises are not desirable, but can be different in future if fundamental rights are given more consideration.

---

<sup>4</sup> See for a selection of notable early scholarship: À Castro d'Oliveira, 'Workers and other Persons: Step-by-Step from Movement to Citizenship - Case Law 1995-2001' [2002] *CML Rev* 77; Eleanor Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non-) Economic European Constitution' (2004) 41 *CML Rev* 743; Michael Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 5 *Inter Alia* 77; Eleanor Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *CML Rev* 13; Charlotte O'Brien, 'Real Links, Abstract Rights and False Alarms: the Relationship between the ECJ's "Real Link" Case Law and National Solidarity' [2008] *ELR* 643.

<sup>5</sup> See Article 45 TFEU; C-370/90 *Singh* EU:C:1992:296; C-168/91 *Konstantinidis* EU:C:1993:115.

<sup>6</sup> Siofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 *ELR* 68.

<sup>7</sup> See the different notions of framing the future of the EU in Elaine Fahey's contribution to this Special Issue.

<sup>8</sup> Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' [2020] *EU Working Paper RSCAS* 2020/33, 5, footnotes omitted.

<sup>9</sup> For the full argument this paper is based on, see Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019).

This paper is structured as follows. First, it outlines the original trajectory of the development of EU citizenship status before the CJEU. It emphasises the role of fundamental rights, how and why they are so connected to EU citizenship. Second, the paper brings citizenship status into the post-Lisbon context of the Eurozone crisis, the migration crisis, the rule of law crisis and the UK's withdrawal from the EU. In each crisis, the claim is that there is room for fundamental rights protection to play a more pivotal role in protecting the individual as an EU citizen. Thirdly, the paper argues that restrictive case law jeopardises the future of EU citizenship status and fundamental rights protection, and that there are legitimate reasons and a feasible way for these rights to be more central to the CJEU's considerations.

## II. ORIGINAL TRAJECTORY OF EU CITIZENSHIP

This paper acknowledges that there is disagreement about framing EU citizenship status as entirely one that seeks to protect fundamental rights as its end goal.<sup>10</sup> That particular debate is outside this paper's scope, as its main arguments derive from the claim that it is less normatively desirable to base EU citizenship status entirely on rights to free movement and residency rather than fundamental rights protection. It has been said that 'for the Court to apply cross-border market logic to finding the limits of EU citizenship is an impermissible assault on the very idea of human dignity'.<sup>11</sup> Emphasising free movement (as the Treaty provisions on the internal market do) makes static citizens the victims rather than beneficiaries of EU citizenship.<sup>12</sup> Therefore, the original foundation of fundamental rights protection in EU citizenship is argued to be equal treatment under Article 18 TFEU. Later this also included rights under the ECHR and eventually rights under Charter of Fundamental Rights.<sup>13</sup>

Conferring citizenship rights based on whether a citizen has exercised their right to free movement indirectly discriminates against those who cannot move – whether for physical or socioeconomic reasons. Free movement rights were originally conferred to those economically able and willing to move for work under Article 45 TFEU.<sup>14</sup> This was an early criticism of the discourse on the free

---

<sup>10</sup> See Martijn van den Brink, 'EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems' (2019) 25 *ELJ* 21; Martijn van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' (2019) 82 *MLR* 293.

<sup>11</sup> Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 43.

<sup>12</sup> Jo Shaw, 'Shunning' and 'seeking' membership: Rethinking citizenship regimes in the European constitutional space' (2019) 8 *Global Constitutionalism* 425, 433.

<sup>13</sup> In case law, see for reference to Article 8 ECHR at first, C-192/99 *Kaur* EU:C:2001:106; C-148/02 *Garcia Avello* EU:C:2003:539; C-200/02 *Zhu and Chen* EU:C:2004:639; C-353/06 *Grunkin and Paul* EU:C:2008:559; C-127/08 *Metock and Others* EU:C:2008:449 then later Article 7 Charter, C-135/08 *Rottmann* EU:C:2010:104; C-480/08 *Teixeira* EU:C:2010:83; C-310/08 *Ibrahim* EU:C:2010:80; C-208/09 *Sayn-Wittgenstein* EU:C:2010:806; C-391/09 *Runevic-Vardyn and Wardyn* EU:C:2011:291; C-34/09 *Zambrano* EU:C:2011:124.

<sup>14</sup> And their families. See Council Regulation 492/2011 of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

movement of persons; failing to adequately distinguish workers' rights from EU citizenship status.<sup>15</sup> Therefore, arguing that fundamental rights protection should underlie EU citizenship status more explicitly shifts the status of EU citizenship to one that relies on humanity and personhood rather than legal status of citizenship.<sup>16</sup> In the seminal "Reverse *Solange*" piece, academics from the Max Planck Institute in Heidelberg led by von Bogdandy endorsed an expansion of the fundamental rights and EU citizenship status relationship by grounding their argument in a broad reading of respect for human rights under Article 2 TEU.<sup>17</sup> This paper argues that this is exactly what EU citizenship status protects.<sup>18</sup>

It is not the intention of this paper to rehash a well-known history of EU citizenship.<sup>19</sup> It is, however, important to highlight the key developments which have shaped how fundamental rights protection became the primary essence of the now infamous description of EU citizenship as 'destined to be the fundamental status of nationals of the Member States',<sup>20</sup> and why. Whilst this was not necessarily explicit from the beginning, the implicit links to fundamental rights protection, originally through more established processes such as adhering to the general principles of EU law or the internal market rules,<sup>21</sup> meant that fundamental rights protection found its way legitimately into the jurisprudence of citizenship rights. It is argued that reference to the principle of non-discrimination under Article 18 TFEU, the legal basis for the CJEU deciding EU citizenship status was different from worker status, was one of the first examples of an implicit yet present fundamental rights discourse early on in the jurisprudence.<sup>22</sup>

Although widely criticised at first for simply being a cosmetic introduction to the Treaties,<sup>23</sup> questions were raised as to how far and wide-reaching the status of EU citizenship would be, and to what extent fundamental rights would, should and could play a role in the scope *ratione materiae* of EU citizenship

---

<sup>15</sup> C-85/96 *Martinez Sala* EU:C:1998:217.

<sup>16</sup> See Dimitry Kochenov, 'The citizenship of personal circumstances in Europe' in Daniel Thym (ed), *Questioning EU Citizenship* (Hart Publishing 2018) 47, though he is not so enthusiastic about linking fundamental rights to EU citizenship status.

<sup>17</sup> Armin Von Bogdandy and others, 'Reverse Solange - Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *CML Rev* 489. This specific idea will be discussed later in the paper under the consideration for the rule of law crises.

<sup>18</sup> In comparison with the internal market, which protects market integration, see Pedro Caro de Sousa, 'Quest for the Holy Grail—Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' [2014] *ELJ* 499, 501. See further, Siofra O'Leary, 'The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *CML Rev* 519; Sara Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 *ELJ* 464.

<sup>19</sup> Much of the literature has been dedicated to this already, see fn4 and HU d'Oliveira, *European Citizenship - Pie in the Sky* (Sage Publications 1995); Niamh Nic Shuibhne, 'The Third Age of EU Citizenship' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012); Yong (n9).

<sup>20</sup> C-184/99 *Grzelczyk* EU:C:2001:458, para 31.

<sup>21</sup> C-29/69 *Stauder v. Ulm* EU:C:1969:57; C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; C-5/88 *Wachauf* EU:C:1989:321; C-260/89 *ERT* EU:C:1991:254.

<sup>22</sup> *Sala* (n15).

<sup>23</sup> O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (n6); Carole Lyons, 'A Voyage Around Article 8: An Historical Evaluation on the Fate of European Union Citizenship' (1997) 17 *YEL* 135; Jo Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 22 *ELR* 554.

status. The conferral of fundamental rights under EU citizenship is argued to be consistent with key developments in the status' history and original objectives behind establishing a status of citizenship in the EU, if taken from a rights perspective. As fundamental rights protection gained greater constitutional footing through Article 6 TEU, the CJEU pushed boundaries to allow conferral of such rights by interpreting citizenship as the legal gateway for them. From being declared the “fundamental status” in *Grzelczyk* in 2001, to explicit incorporation of the right to private and family life under Article 8 ECHR in case law in the mid to late 2000s,<sup>24</sup> to the seminal *Zambrano* case in 2011 where EU citizenship was declared an independent legal basis for rights, which potentially included fundamental rights.<sup>25</sup> These cases, and many others, demonstrated how the CJEU began conferring rights to individuals as citizens, rather than just as workers.<sup>26</sup>

Through CJEU jurisprudence, interpretations of the status of EU citizenship began to embrace a broader integrationist objective as its material and personal scope widened. It is argued both strands of broadening can be attributed to greater fundamental rights protection. Moving towards fundamental rights moved the status of citizenship away from the internal market.<sup>27</sup> Since the CJEU in *Zambrano* declared EU citizenship status an independent legal basis for rights, a direct link to fundamental rights became possible.<sup>28</sup> When the Lisbon Treaty came into force, it could have been the watershed moment for fundamental rights and EU citizenship status since fundamental rights were now given binding status in the Charter and the EU was committed to ECHR accession.<sup>29</sup> However, this did not happen. The claim is that this is largely due to the waning appetite for such a wide-reaching constitutional shift in an increasingly hostile political atmosphere as the EU rides the waves of its “four crises”: the Eurozone, migration, rule of law crises and Brexit.

### III. THE FOUR CRISES

---

<sup>24</sup> See cases in fn13.

<sup>25</sup> *Zambrano* (n13), though arguably there were signs of this potential as early as C-413/99 *Baumbast* EU:C:2002:493 in para 84, ‘Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article [21 TFEU]’.

<sup>26</sup> This includes, but is not limited to, previously economically active individuals: *Sala* (n15); *Grzelczyk* (n20); C-60/00 *Carpenter* EU:C:2002:434 (n); C-224/98 *D'hoop* EU:C:2002:432; *Baumbast* (n25); derived rights of from family members: *Garcia Avello* (n24); *Chen* (n13); *Zambrano* (n13) and students and other non-economically active individuals: C-138/02 *Collins* EU:C:2004:172; C-456/02 *Trojani* EU:C:2004:488; C-209/03 *Bidar* EU:C:2005:169; C-158/07 *Förster* EU:C:2008:630; C-22/08 *Vatsouras* EU:C:2009:344.

<sup>27</sup> Michelle Everson, ‘The Legacy of the Market Citizen’ in Jo Shaw and Gillian More (eds), *New Legal Dynamics of the European Union* (OUP 1995).

<sup>28</sup> See Niamh Nic Shuibhne, ‘Seven Questions for Seven Paragraphs’ (2011) 36 *ELR* 161; Hanneke van Eijken and Sybe de Vries, ‘A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*’ (2011) 36 *ELR* 704; Kay Hailbronner and Daniel Thym, ‘Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi* (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011’ (2011) 48 *CML Rev* 1253.

<sup>29</sup> Article 6 TEU; see Yong (n9) 143ff. On whether this accession is desirable in the context of the Area of Freedom, Security and Justice, see Tobias Lock's contribution to this Special Issue.

This section will show how the future of the fundamental rights discourse in EU citizenship has been affected by the four “crises” in the context of the CJEU’s interpretation of the status as the legal gateway to fundamental rights protection. How the CJEU approaches citizenship and fundamental rights in its jurisprudence will be central to the analysis here, since Lisbon constitutionalised the rights discourse in Article 6 TEU. Since Lisbon, there has not been a notable enough shift towards integrating rights protection into EU citizenship status, so this paper argues the merits of doing so with specific regard to EU citizenship’s future. This section analyses case law on the nexus between citizenship and legal area relevant to the crisis at hand (finance, migration, rule of law, nationality) or, in some situations, cases concerning the relevant crises alongside an examination of citizenship case law decided in the same timeframe. The aim is to show how each crisis has affected the jurisprudence of the CJEU and subsequently, the future of citizenship status and its requisite rights through a fundamental rights lens.

### ***A. EUROZONE CRISIS***

The Eurozone crisis, the earliest of the four crises in this paper, began around the same time the Lisbon Treaty came into force at the end of 2009.<sup>30</sup> It is understood that its widespread effects trickled down to affect the quality of life of EU citizens too, including those not in Member States directly affected by the crisis.<sup>31</sup> This can be attributed to the fact that the Euro itself has arguably been used as a tool to forge European identity and integrate the community.<sup>32</sup> If seen as a vehicle of social cohesion,<sup>33</sup> then there is an argument that the Eurozone did indeed seek to achieve the same objective as EU citizenship status, namely, an ever closer Union. However, if this connection is made, then there would logically also be a correlation between the problems associated with the Eurozone debt crisis and an increasing Euroscepticism in the EU project of integration. This would translate to there being less appetite for a wide scope of fundamental rights under EU citizenship.

It is necessary to acknowledge the political atmosphere around the Eurozone crisis in light of citizenship cases decided during this period. Whilst the debt crisis was happening, faith in EU project was waning, particularly in 2011.<sup>34</sup> In this timeframe, what had the potential to be opportunities for deeper integration

---

<sup>30</sup> Beginning with Greece, when it became evident that they may default on their debt. See ‘Greece’s debt reaches 300bn euros’ *BBC News* (10 December 2009) <<http://news.bbc.co.uk/1/hi/business/8406665.stm>> accessed 10 June 2015.

<sup>31</sup> In *Eurobarometer 76.1 Crisis* (European Parliament, January 2012) 6, ‘The majority of Europeans say that they are now feeling the effects of the crisis: approximately nine out of ten people see the impact in the world, European and national economies, and 59% of respondents when it comes to their personal situation.’; Espen DH Olsen, ‘Eurocrisis and EU citizenship’ in Virginie Guiraudon, Carlo Ruzza and Hans-Jörg Trenz (eds), *Europe’s Prolonged Crisis* (Springer 2015) 86.

<sup>32</sup> Cris Shore, ‘The euro crisis and European citizenship’ (2012) 28 *Anthropology Today* 5, 7.

<sup>33</sup> Olsen (n31).

<sup>34</sup> *Major Trends in the European Public Opinion with regard to the European Union* (European Parliament Exploratory Study, November 2015) 11ff.



of fundamental rights into EU citizenship because of their binding status in the Lisbon Treaty turned into cautious, more deferential judgments, to national interests in particular. This often meant restricting the wide scope of EU citizenship to avoid claims that EU citizens were becoming unreasonable burdens on host Member States, more reminiscent of language used to describe market citizenship. *Zambrano* and the cases in 2011 on similar family reunification issues concerning non-EU citizens are good examples of this.<sup>35</sup> After the CJEU declared EU citizenship status an independent legal basis for rights, it did not clearly state whether fundamental rights should have a central role to play in its judicial assessments going forward. As a result of this lack of clarity, there was room for the CJEU to decide against fully integrating fundamental rights and EU citizenship, strictly adhering to the black letter criteria under the Directive 2004/38.<sup>36</sup> This, it is argued, is inconsistent with the trajectory and potential fundamental rights had to become integrated into EU citizenship.

Then, in the aftermath of *Zambrano* over a year later, in the seminal case of *Pringle*, a question of legality of the Treaty in establishing the emergency European Stability Mechanism (ESM) to safeguard the Eurozone came before the CJEU.<sup>37</sup> Some perceived the judgment as beyond the CJEU's competences and a political choice to save the Eurozone, but if the CJEU did not uphold the ESM Treaty, it would have put the entire Eurozone at risk of collapse. The incentive to avoid this was enough to instead act to fulfil national interests.<sup>38</sup> A similar situation of creative and political judicial reasoning in citizenship is the earlier case of *Carpenter*,<sup>39</sup> where only a potential cross-border link under the free movement of services was determined by the CJEU to be enough to bring a family about to be separated within the scope of protection under the Treaty. Some would argue this case was decided with the objective of upholding fundamental rights in mind. Therefore, from both situations, it can be extrapolated that that if there was a political appetite for it – be it saving the Eurozone or greater fundamental rights protection – the CJEU has precedent for pushing boundaries towards this wider objective.

Therefore, the overall argument of the Eurozone crisis' effects on citizenship status and fundamental rights is a correlation between increasing deference by the CJEU as to what the political atmosphere at the time demands. This kind of development shapes the general *acquis communautaire* of the EU, and sets the tone for how it may proceed in future. Especially in the wake of the various crises that

---

<sup>35</sup> C-434/09 *McCarthy* EU:C:2011:277; C-256/11 *Dereci* EU:C:2011:734.

<sup>36</sup> C-424/10 *Ziolkowski* EU:C:2011:866; C-348/09 *PI* EU:C:2012:300; C-40/11 *Iida* EU:C:2012:691; C-86/12 *Alokpa* EU:C:2013:645. See Steve Peers and Chiara Berneri, '*Iida* and *O and S*: Further Developments in the Immigration Status of Static EU Citizens' [2013] *JIANL* 162.

<sup>37</sup> C-370/12 *Pringle* EU:C:2012:756.

<sup>38</sup> Alicia Hinarejos, 'The Role of the Courts in the Wake of the Eurozone Crisis' in Mark Dawson, Henrik Enderlein and Christian Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (OUP 2015) 124.

<sup>39</sup> *Carpenter* (n26).

unfolded after the Eurozone one – not to mention that the Eurozone crisis was not resolved immediately – it would seem logical to assume that deference to political sensitivities is a deciding factor for the CJEU.<sup>40</sup> *Pringle* demonstrates this. However, this is not necessarily to the benefit of the status of EU citizenship, in that deference in this case is to the national Member State interests. In *Pringle*, it was mainly the interests of Member States suffering directly from the debt crisis and the political issues at play.

## ***B. MIGRATION CRISIS***

Soon after most of the affected Member States had officially exited their financial bailout programmes, the EU began to see a flood of migrants arriving in its territory in 2015 and seeking refuge and asylum within the territory of the Union. This led to an increase in litigation before the CJEU that dealt with balancing the rights of migrants versus the interests of Member States, as well as the EU's interest in controlling its borders.<sup>41</sup> The second crisis in this paper, the migration crisis and its associated Area of Freedom, Security and Justice (AFSJ), is treated as a context within which to highlight the fragility of the EU project of cooperation and integration. This section offers a different take of EU citizenship that has since been espoused in this paper, which will serve to emphasise why the fundamental rights relationship is all the more important for its future.

Rather than considering more traditional migration case law which often concerns non-EU citizens, this section will use the migration crisis as a context within which to consider the value of EU citizenship status for EU citizens. The differences between those “privileged” enough to benefit from protection and those who do not are more noticeable in this context. The argument is that fundamental rights can close this gap somewhat. Rights to free movement have been ‘paired with a closure of the outer boundaries of the EU’,<sup>42</sup> leading Fine to argue that ‘there is a far greater and growing divide between European citizens and the people they want to keep out.’<sup>43</sup> EU citizenship’s exclusionary nature puts a spotlight on problems associated with free movement in the well-known “Fortress Europe” criticism – that free movement rights and principles emphasising EU borders imply that being within the EU is a privilege. There is a sense of a fortified fortress of European nations, protecting those within at the expense of keeping others out.<sup>44</sup> This section will thus consider the nexus between EU citizenship and

---

<sup>40</sup> Urška Šadl and Mikael Rask Madsen, ‘Did the financial crisis change European citizenship law? An analysis of citizenship rights adjudication before and after the financial crisis’ (2016) 22 *ELJ* 40, 57.

<sup>41</sup> Daniel Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (2016) 53 *CML Rev* 1545.

<sup>42</sup> Shaw, ‘“Shunning” and “seeking” membership: Rethinking citizenship regimes in the European constitutional space’ (n12) 434.

<sup>43</sup> Sarah Fine, ‘Whose Freedom of Movement Is Worth Defending?’ in Rainer Baubock (ed), *Debating European Citizenship* (Springer 2019) 131.

<sup>44</sup> Sionaidh Douglas-Scott, ‘The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice’ (2004) 29 *ELR* 219.

the AFSJ through extradition and arrest warrant cases, to argue for a greater role for fundamental rights protection as a way to redress the balance in the CJEU in its tendency to prioritise free movement rights under EU citizenship.

Cases on the extradition of EU citizens to non-EU Member States show the CJEU adopting a protective role that keeps its own citizens safe, but whose acknowledgement of fundamental rights protection more broadly is missing. This, it is argued, is not a good precedent for cases that do not involve EU citizens, which have increased since the migration crisis begun. In *Petruhhin*, to protect an Estonian in Latvia from being extradited to Russia, the CJEU decided that claiming a restriction of his free movement rights under Article 21 TFEU was enough.<sup>45</sup> This was instead of relying on EU citizenship status under Article 20 TFEU requiring equal treatment under Article 18 TFEU as if the claimant was Latvian and subject to national laws that would have seen the same outcome.<sup>46</sup> Cleverly, it achieves the objective of protecting the Union citizen from being subjected to non-EU jurisdiction,<sup>47</sup> but potentially has wider implications for fundamental rights protection as it emphasises free movement rather than equal treatment, widening the gap even further between EU citizens and non-EU migrants.

Whilst it is recognised that non-EU migrants do not benefit from protection under EU citizenship status, the argument is that if greater deference is given to a fundamental rights discourse in the case law as an approach generally adopted by the CJEU, then this gap may be narrowed. In *Pisciotti*, an Italian in Germany was sought by the United States for extradition,<sup>48</sup> and ‘a non-discrimination analysis is ultimately displaced by a free movement analysis’ with even less engagement with Article 18 TFEU than in *Petruhhin*.<sup>49</sup> The CJEU confirmed that extraditing the claimant to the USA would amount to a restriction on his free movement, but that alternatively, he could be surrendered to Italy which would be less of an interference. *Pisciotti* confirmed that the CJEU now considered that obstacles to free movement brought situations within the scope of the Treaty and formed the basis of conferral of protection. In terms of a temporal correlation with the migration crisis, there may be an underlying trend in the CJEU of pulling back from an entirely fundamental rights-based approach.<sup>50</sup>

---

<sup>45</sup> C-182/15 *Petruhhin* EU:C:2016:630.

<sup>46</sup> Niamh Nic Shuibhne, ‘The ‘Territory of the Union’ in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives’ (2019) 38 *YEL* 267, 295.

<sup>47</sup> Miguel João Costa, ‘The emerging EU extradition law: *Petruhhin* and beyond’ (2017) 8 *New Journal of European Criminal Law* 192, 214.

<sup>48</sup> C-191/16 *Pisciotti* EU:C:2018:222.

<sup>49</sup> Stephen Coutts, ‘From Union citizens to national subjects: *Pisciotti*’ (2019) 56 *CML Rev* 521, 528.

<sup>50</sup> Conversely, see C-247/17 *Raugevicius* EU:C:2018:898, where an EU citizen’s long term resident status in the host Member State, Finland, was a consideration in the CJEU’s determination that he should not be extradited.

The CJEU failing to embrace a fundamental rights discourse continues in cases on the Framework Directive on the European Arrest Warrant (FDEAW), many of which also involve non-EU citizens.<sup>51</sup> They have seen the CJEU being less flexible when considering if exceptions to executing arrest warrants can be allowed. Member States are able to refuse to execute an arrest warrant issued by another Member State in order to protect the fundamental rights of the individual in question – namely, promoting a rights-based individual assessments. However, recently, instead of putting the individual at the centre of the consideration – whether EU citizens or not – precedent shows that necessary derogations from the principle of mutual trust, a principle which assumes that Member States trust each other’s criminal processes, are now being ‘firmly tamed and controlled.’<sup>52</sup>

These case law trends demonstrate a hesitance in the CJEU towards fully embracing a rights-based citizen-centric discourse in the Union in the AFSJ. In this context, Nic Shuibhne rightly argues that the EU has become less citizen-centric and more territory focused.<sup>53</sup> By keeping EU citizens within the EU territory, the AFSJ’s borders are protected. As the above cases show, this places much emphasis on free movement and residence rights under Article 21 TFEU.<sup>54</sup> If EU citizenship status is meant to be rights-driven as an independent legal basis for conferral of rights-based protection, then the approach Nic Shuibhne describes moves further away from a future for EU citizenship that wholly embraces a fundamental rights discourse, and instead reinforces the borders of Fortress Europe. This approach translated into migration cases that involve non-EU citizens is the concern that this paper identifies.

### ***C. RULE OF LAW CRISIS***

Overlapping temporally with both the Eurozone and migration crises is the third crisis identified in this paper concerning the rule of law.<sup>55</sup> This crisis has seen EU values protected under Article 2 TEU systematically being breached by certain Member States,<sup>56</sup> and there has been little success in trying to

---

<sup>51</sup> See C-396/11 *Radu* EU:C:2013:39; C-394/12 *Abdullahi* EU:C:2013:813; C-404/15 *Aranyosi* EU:C:2016:198. For further, see Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Bloomsbury Publishing 2020).

<sup>52</sup> Ermioni Xanthopoulou, ‘Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust’ (2018) 55 *CML Rev* 495.

<sup>53</sup> Nic Shuibhne, ‘The ‘Territory of the Union’ in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives’ (n46) 281.

<sup>54</sup> For a lengthy debate on the merits and demerits of basing EU citizenship rights on free movement, see contributions by Floris de Witte et al in Rainer Baubock (ed), *Debating European Citizenship* (Springer 2019).

<sup>55</sup> Viviane Reding, ‘The EU and the Rule of Law – What next’ (*EU Commission*, 4 September 2013) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_13\\_677](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677)> accessed 20 February 2020.

<sup>56</sup> The values include ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.’ The Member States concerned are mostly Central and Eastern European states, particularly Hungary and Poland. See Dimitry Kochenov and Petra Bárd, ‘Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement’ [2018] *RECONNECT Working Paper No 1—July 2018*.

deter these Member States (at times, more forcefully) from continuing to do so.<sup>57</sup> A triangular relationship is said to exist between the rule of law, democracy and fundamental rights, meaning that they are ‘inherently and indivisibly interconnected, and interdependent on each of the others, and they cannot be separated without inflicting profound damage to the whole and changing its essential shape and configuration.’<sup>58</sup> This is important, for it shows how attacks on the rule of law could affect fundamental rights protection and vice versa – how protection of the rule of law could bolster rights. As such, the analysis is more future-focused, advocating for a refocus on values like fundamental rights – as part of citizenship – to encourage an overall shift in the judicial approach as the CJEU navigates this crisis.

Sarmiento and Sharpston linked the triangular relationship most succinctly to EU citizenship status arguing that Article 2 TEU values ‘also entitles the citizen to require the necessary safeguards from the Union’s institutions against arbitrary action that breaches basic constitutional principles.’<sup>59</sup> Taken to its logical conclusions, the status of EU citizenship and its associated rights bear consideration in light of the rule of law and the recent crises of the rule of law unfolding in various Member States. The situation has deteriorated since 2015 mainly in Hungary and Poland because of the rise of the far right in their respective governments.<sup>60</sup> As Pech and Scheppele put it, ‘[t]he ‘values crisis’ may not seem as urgent as the other crises on European plates, but it has the most far-reaching implications for the European project...[because] there are fewer reasons for the EU to exist’.<sup>61</sup> Therefore, given the urgency and importance of correctly handling this crisis, the approach taken by the CJEU in dealing with cases related to the rule of law is of interest for there have been some positive developments of late.

In *Commission v Poland*, an attempt was made by Polish authorities to lower judges’ retirement ages in the Supreme Court. It was held that this infringed the principle of judges’ irremovability and independence of the judiciary.<sup>62</sup> The CJEU decided that Poland had infringed its obligations under Article 19(1) TEU on providing national ‘remedies sufficient to ensure effective legal protection’ with this new law on judges’ retirement ages. This is an important decision in light of the fundamental rights discourse in citizenship because ‘the Court seems to render Article 2 TEU judicially applicable’ through

---

<sup>57</sup> Leonard Besselink, ‘The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives’ in Dimitry Kochenov and András Jakab (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017).

<sup>58</sup> Sergio Carrera, Elspeth Guild and Nicholas Hernanz, *The triangular relationship between fundamental rights, democracy and the rule of law in the EU: towards an EU Copenhagen mechanism* (Centre for European Policy Studies, 2013).

<sup>59</sup> Daniel Sarmiento and Eleanor Sharpston, ‘European Citizenship and Its New Union: Time to Move On?’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 238.

<sup>60</sup> Melanie Smith, ‘Staring into the Abyss: A Crisis of the Rule of Law in the EU’ [2019] *ELR* 568.

<sup>61</sup> Laurent Pech and Kim Lane Scheppele, ‘Illiberalism within: Rule of Law Backsliding in the EU’ (2017) 19 *CYELS* 3, 5.

<sup>62</sup> C-179/19 *Commission v Poland* EU:C:2019:531.

Article 19(1) TEU in what is described as a ‘combined approach’.<sup>63</sup> This is similar to what this paper suggests when arguing that the legal gateway for fundamental rights protection is EU citizenship status. Spieker notes that this case builds on the decision in *Associação Sindical dos Juizes Portugueses*, where the CJEU laid the groundwork for its “combined approach” giving ‘concrete expression to the value of the rule of law stated in Article 2 TEU’ through Article 19 TEU as well.<sup>64</sup> He suggests that seeking to protect the EU’s common values in this way could remedy further assaults on the rule of law in the EU.<sup>65</sup> Importantly, this approach can be positively translated to fundamental rights protection, in that EU citizenship status is the equivalent of Article 19 TEU, a status that can give concrete expression to Article 2 TEU – specifically respect for human rights.

There is a valid connection between the rule of law and individual rights given that these are what are at stake when seeking to protect the EU community of citizens.<sup>66</sup> Given this, it would be possible to expand the CJEU’s framing of the expression of Treaty values to fundamental right through EU citizenship status to achieve the objective of protecting values under Article 2 TEU, human rights. The relationship supported throughout this paper of EU citizenship as the legal gateway for fundamental rights seems more feasible, remaining within the limits of the Treaties and strengthening the Union’s overall resolve to stand by and protect the values that it is premised on. However, whilst a connection between fundamental rights and the rule of law (and democracy) has some clear benefits in the context of EU citizenship, proceeding with caution is recommended going forward, due to the fact that the rule of law crisis is not abating.<sup>67</sup> There is still a risk of triggering further distrust and rogue behaviour in Member States and worsening the rule of law crises because the above approach could raise questions of competence.<sup>68</sup> The fact that there is collateral damage to citizens’ rights if rule of law backsliding continues makes it all the more important to champion an integrated fundamental rights discourse in EU citizenship. The cases here show that this is entirely possible.

#### **D. BREXIT**

---

<sup>63</sup> Luke Dimitrios Spieker, ‘Commission v. Poland – A Stepping Stone Towards a Strong “Union of Values”?’ (*Verfassungsblog*, 30 May 2019) <<https://verfassungsblog.de/commission-v-poland-a-stepping-stone-towards-a-strong-union-of-values/>> accessed 10 June 2020.

<sup>64</sup> C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117.

<sup>65</sup> Luke Dimitrios Spieker, ‘Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis’ (2019) 20 *German Law Journal* 1182, 1207.

<sup>66</sup> Sandra Mantu, ‘EU citizenship and the rule of law in times of Brexit: generosity by reciprocity’ (EU Global Leadership in the Rule of Law Conference, Zagreb, February 2019).

<sup>67</sup> Ottavio Marzocchi, *The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU* (European Parliament, Briefing requested by the LIBE committee Monitoring Group on Democracy, Rule of Law, Fundamental Rights, 2020).

<sup>68</sup> Armin von Bogdandy and Luke Dimitrios Spieker, ‘Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse *Solange*, and the Responsibilities of National Judges’ (2019) 15 *European Constitutional Law Review* 391, 419.

The UK's withdrawal from the EU has been of increasing interest since mid-2016, when the UK voted in favour of leaving the EU. One of the main negotiating priorities of the EU was citizens' rights.<sup>69</sup> A renewed understanding of the importance of EU citizenship status can be argued to have arisen in light of the UK's withdrawal from the EU. Given that the transition period for withdrawal has not yet ended at the time of writing, the exact shape of the UK's relationship with the EU has yet to be determined. As such, cases here do not directly address consequences of the UK's withdrawal specifically, but their judicial rationale can be transposed to potential Brexit scenarios.<sup>70</sup> The general sense is that there is a higher level of protection under EU law as to protection of citizens' rights than in national law, especially that of the UK.<sup>71</sup> Therefore, most citizenship cases of relevance concern reliance upon EU citizenship through Member State nationality and assessing the proportionality of the status no longer being available as a legal basis for rights.

In 2017, *Lounes* saw a Spanish national naturalised as British after moving to the UK marry an Algerian, who then applied for residency as the non-EU spouse of an EU citizen. He was denied on the basis that his wife had naturalised *after* exercising her Treaty rights and could no longer rely on Directive 2004/38, but only on national law now as a British citizen. The CJEU confirmed that Directive 2004/38 did not form a legal basis for derived residency rights for non-EU spouses, proving how limited its scope for rights had become.<sup>72</sup> Instead, though, the claimant could rely on Article 21(1) TFEU for the same rights, demonstrating that better protection existed under the Treaties for EU citizenship.<sup>73</sup> It highlights that losing EU citizenship status would clearly put individuals in a less desirable position as to their rights protection,<sup>74</sup> which here would have seen rights to family reunification – a fundamental right under the right to private and family life – interfered with.<sup>75</sup> Seen from a fundamental rights perspective, this becomes a more urgent question. If it is accepted that the fundamental status of EU citizenship also

---

<sup>69</sup> Negotiations culminated in Council (EU) 2019/C 384, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (12 November 2019), Part Two Citizens' Rights.

<sup>70</sup> The only potential case specifically on Brexit and citizens' rights ultimately did not reach the CJEU, see Ronan McCrea, 'Brexit EU Citizenship Rights of UK Nationals and the Court of Justice' (*UK Constitutional Law Association Blog*, 8 February 2018) <<https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice>> accessed 6 March 2020.

<sup>71</sup> Eleanor Spaventa, 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) 5 *ELR* 589; Eleanor Spaventa, 'The rights of citizens under the Withdrawal Agreement: a critical analysis' (2020) 45 *ELR* 193. The new regime for EU citizens in the UK post-Brexit, the EU Settlement Scheme, also presents administrative challenges, see Joe Tomlinson, *Quick and Uneasy Justice: an Administrative Justice Analysis of the EU Settlement Scheme* (Public Law Project, 2019).

<sup>72</sup> C-165/16 *Lounes* EU:C:2017:862, para 44.

<sup>73</sup> Jo Shaw, 'EU citizenship: still a fundamental status?' in Rainer Baubock (ed), *Debating European Citizenship* (Springer 2019) 4.

<sup>74</sup> See also, Lisa O'Carroll, 'Northern Ireland-born British and Irish win EU citizenship rights' *The Guardian* (14 May 2020) <<https://www.theguardian.com/uk-news/2020/may/14/northern-ireland-born-british-and-irish-win-eu-citizenship-rights>> accessed 11 June 2020. Emma de Souza won the right of non-EU spouses of Northern Irish nationals (whether British or Irish) to apply for settled status under the EU Settlement Scheme.

<sup>75</sup> Article 7 Charter, Article 8 ECHR.

gives rise to fundamental rights protection, then this will be lost when EU citizens lose the right to rely on these rights after Brexit.

More recently in *Tjebbes*, the CJEU saw several Dutch nationals automatically lose Dutch nationality after being outside the Netherlands for 10 consecutive years or more as per Dutch law. The area of nationality law is accepted to be outside the competence of the EU,<sup>76</sup> so the CJEU brought the matter within its competences by arguing that loss of nationality can affect EU citizenship status, a precedent it had set in past case law.<sup>77</sup> It then stated that EU law does not preclude Member States from having a such a law to satisfy genuine link requirements for conferring nationality, but it is necessary for the conditions to have due consideration to proportionality if loss of nationality would affect rights under EU citizenship status.<sup>78</sup> When undertaking this proportionality assessment, the consequences of losing EU citizenship ‘cannot be hypothetical or merely a possibility.’<sup>79</sup> This case has potentially wide-reaching implications due to the comparable situation of Brexit, where loss of EU citizenship status is certainly not hypothetical nor merely a possibility after the transition period ends.

*Tjebbes* seems to recognise that as in *Lounes*, losing EU citizenship status and the rights therein is not a desirable position to be in. It cleverly tries to strike a balance between Member State and EU interests,<sup>80</sup> but more importantly it sets a strong precedent to require a thorough proportionality assessment in light of tangible effects on the claimant upon loss of their EU citizenship rights, not unlike its predecessor *Rottmann*.<sup>81</sup> It is here where the fundamental rights discourse is all the more relevant, for if a serious infringement of one’s fundamental rights is considered a disproportionate reason to remove one’s claim to this right through EU citizenship status, then it bolsters the status’ substance and worth, truly proving its fundamental nature. The stronger the claim to fundamental rights through EU citizenship, the greater the chances that losing EU citizenship status would be declared disproportionate. Therefore, the value of *Lounes* and *Tjebbes* in the context of EU citizenship’s future in a post-Brexit Britain is to show that having EU citizenship can put individuals in a better position particularly as to protection of their right to private and family life.<sup>82</sup>

#### IV. A FUTURE FOR EU CITIZENSHIP AND FUNDAMENTAL RIGHTS?

---

<sup>76</sup> C-369/90 *Micheletti* EU:C:1992:295.

<sup>77</sup> C-221/17 *Tjebbes* EU:C:2019:189, para 32; *Rottmann* (n13).

<sup>78</sup> *Tjebbes* (n77) para 40.

<sup>79</sup> *Ibid* para 44.

<sup>80</sup> Hanneke van Eijken, ‘Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights’ (2019) 15 *European Constitutional Law Review* 714.

<sup>81</sup> *Rottmann* (n13).

<sup>82</sup> Adrienne Yong, ‘Human rights protection as justice in post-Brexit Britain: a case study of deportation’ in Tawhida Ahmed and Elaine Fahey (eds), *On Brexit: Law, Justices and Injustices* (Edward Elgar 2019).



The aim of the analysis of the above four crises was to highlight how fundamental rights through citizenship should, and later, could play a role in order to assess whether there is a future for EU citizenship and fundamental rights. In some cases, fundamental rights did not play enough of a role, such as in the context of the Eurozone and migration crisis. However, in the rule of law crisis and Brexit, the benefits of this relationship can be argued to have become more evident. Perhaps there was more reason initially to be pessimistic about the future of EU citizenship and fundamental rights early on because of the political disquiet in the Eurozone and migration crises. The general sense of dissatisfaction with the EU was particularly prominent then, as perception of the effects on citizens' quality of life and personal situations loomed large for many after the crises first began.<sup>83</sup>

However, as the EU progressed slowly out of its Eurozone and migration crises and serious assaults on EU values in Article 2 TEU started to increase, perhaps it can be argued that there was more of a political need for the EU to reassert its values and enforcement to combat this. Indeed, the case law briefly outlined above in the context of the rule of law and Brexit demonstrate this. The rule of law case law proves that an EU based on its values – like respect for human rights – is possible, and not just normatively. In this way, the EU can also avoid instigating further tensions which may arise from applying sanctions for breach of the rule of law under Article 7 TEU, referred to as the 'nuclear option' by the then Commission President, José Manuel Barroso.<sup>84</sup> The citizenship case law applicable to Brexit demonstrates that it is indeed a valuable to hold, and more importantly, retain EU citizenship.<sup>85</sup> Therefore, the argument is that reasserting respect for human rights should be done through the legal gateway of EU citizenship status. In this way, there can be a future for EU citizenship status and fundamental rights.

This optimistic view of EU citizenship status' future can be taken if looking to cases which mainly focus on rights under Article 20-21 TFEU, rather than Directive 2004/38 in more recent years. Indeed, criticism of EU citizenship as seen in the context of the migration crisis concerning its exclusionary and conditional nature is all the more prominent in light of what the CJEU confirm about Directive 2004/38, namely that it strictly follows the conditions under Article 7(1)(b) of having sufficient resources and comprehensive health insurance in order to fall within the scope of the Directive, and the fact that a purely internal situation will not trigger its application either.<sup>86</sup> For Directive 2004/38's provisions to apply, it thus requires a triggering of the Treaty through exercising free movement rights, which, noted earlier, discriminates between those who can actually avail themselves of this right and those who

---

<sup>83</sup> *Eurobarometer 76.1 Crisis* (n31).

<sup>84</sup> Commission, *State of the Union 2012 Address* (Speech/12/596, 12 September 2012).

<sup>85</sup> Especially as the Withdrawal Agreement retains mostly the conditions and provisions under Directive 2004/38, see Stijn Smismans, *Ring-fencing Citizens' Rights in the Brexit Negotiations: Legal Framework and Political Dynamics* (DCU Brexit Institute-Working Paper 1-2019, 2019).

<sup>86</sup> *McCarthy* (n35) para 43.

cannot. It is thus positive that several more recent cases on family reunification have seen outcomes that have the effect of protecting non-EU family members' rights – a familiar fundamental right in the context of EU citizenship.

In *Coman*, an American married to a Romanian sought residency in Romania, rejected on the basis that Romania did not recognise same-sex marriages. The CJEU confirmed that Directive 2004/38 could not confer a derived right of residency autonomously to non-EU citizens, but it also did not allow Member States to deny derived residency solely based on the non-recognition of same-sex marriages.<sup>87</sup> In *RH*, a Moroccan married to a Spanish national was refused residency because his Spanish wife had not shown she had sufficient resources to fall within Directive 2004/38.<sup>88</sup> The CJEU makes pains to emphasise that as a whole, 'EU law does not, *in principle*, apply to an application for family reunification of a third-country national'<sup>89</sup> but Article 20 TFEU might apply instead as long as there was evidence of a deprivation of genuine enjoyment forcing the EU citizen to leave the territory of the EU if their family did not successfully derive rights. *Lounes*, mentioned earlier, can also be considered under the umbrella of cases which rely on the Treaty rather than the Directive to confer rights on non-EU family members. These cases are, in general, positive for refocusing the narrative in the CJEU on EU citizenship status rather than the internal market. However, what is not so obvious from just analysing the outcomes is that the CJEU is returning to the notion that these derived rights are justified because there would otherwise be an obstacle to free movement, not fundamental rights.

In all three cases above, family reunification rights were evidently the main substance of the rights that the non-EU spouses sought. However, a thorough assessment of the right to private and family life is entirely missing from each judgment. Not unlike the extradition cases considered under the migration crisis, weight is being placed on having exercised free movement rights rather than simply on the status of being an EU citizen. There is a discord with this and the interpretation that Article 20 TFEU is the gateway for recourse to a wider scope of rights. Having outlined the trajectory and merits of a fundamental rights discourse as part of the scope *ratione materiae* of EU citizenship, going back to free movement obstacles suggests a re-emergence of market-based citizenship.<sup>90</sup> All three cases could have been decided instead on the basis of fundamental rights protection as part of being an EU citizen. Even worse in *Lounes*, reference to Article 20 TFEU itself is absent and only Article 21 TFEU is mentioned. Therefore, what these cases show is that there may be a future for EU citizenship, but that it might not be based on fundamental rights protection. The crises analysis outlined why this is not desirable.

---

<sup>87</sup> C-673/16 *Coman and Others* EU:C:2018:385.

<sup>88</sup> C-836/18 *RH* EU:C:2020:119.

<sup>89</sup> *Ibid* para 33.

<sup>90</sup> Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *CML Rev* 1597.

Whilst it is difficult to conceive of EU citizenship status in any other form than being cleaved to Member State nationality because of the very nature of the EU as a supranational entity,<sup>91</sup> this is not the same for EU citizenship as market citizenship. This paper has supported the argument that there must be more emphasis on a connection *through* the fundamental status of EU citizenship *to* fundamental rights protection. This would allow the status to fit within the rigid framework within which EU law – in particular, EU citizenship status – finds itself limited by. The CJEU has transcended these boundaries by supporting the normative discourses on rights protection and interpreting EU citizenship status as being one that seeks to protect fundamental rights as an inherent part of its scope *ratione materiae*.

However, Thym argued that indicators of disquiet amongst the EU community and greater Euroscepticism go as far back as the rejection of the Draft Constitutional Treaty in the early 2000s. As such, he believed it was almost inevitable that ‘any fortification of citizens’ rights beyond the single market remains linked to broader constitutional trends’.<sup>92</sup> This claim can be linked to the crises’ potential negative effects on the scope of fundamental rights and EU citizenship. Indeed recently, more explanation is demanded for choices being made before the CJEU, but ironically, the more explanations are given, the greater the risk is of raising future conflict and disagreements.<sup>93</sup> After all, the outcomes were favourable for the non-EU spouses in the cases above, so the question remains: what exactly is the value of emphasising fundamental rights is if the outcome can be reached in other ways?

The answer to this is that it appears by focusing on free movement that the CJEU is behaving as if it is trying to determine if a citizen is “deserving” of protection through an examination of whether the individual demonstrates a sufficient level of solidarity and integration with the host State.<sup>94</sup> This would also somewhat suggest that the EU condones Member States putting different values on different individuals, again harking back to the days of contributory reciprocal nature of free movement rights of economically active citizens.<sup>95</sup> The primary reason for firmly being in favour of protecting citizenship as a status protecting fundamental rights is because citizens and their rights have always been tangential to the internal market.<sup>96</sup> In these situations, the individual and their rights suffered as collateral damage of the operation of policies that were established to resolve such crises, as noted in the rule of law

---

<sup>91</sup> Though there are some who argue for its autonomy from nationality, see Oliver Garner, ‘The existential crisis of citizenship of the European Union: the argument for an autonomous status’ (2018) 20 *CYELS* 116.

<sup>92</sup> Daniel Thym, ‘The Failure of Union Citizenship Beyond the Single Market’ in Rainer Baubock (ed), *Debating European Citizenship* (Springer 2019) 106.

<sup>93</sup> Nic Shuibhne, ‘The ‘Territory of the Union’ in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives’ (n46) 269.

<sup>94</sup> Stephen Coutts, ‘The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights’ (2019) 21 *CYELS* 318, 327.

<sup>95</sup> Stephen Coutts, ‘The Absence of Integration and the Responsibilisation of Union Citizenship’ (2018) 3 *European Papers* 761, 777 describes it as an ‘evolution of past practice.’

<sup>96</sup> Jason Coppel and Aidan O'Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 12 *Legal Studies* 227.

context in terms of the triangular relationship of EU values. Each crisis' effects are lasting and bleed into other areas where new crises emerge in a constantly shifting political order. Therefore, the individual needs to be protected and kept at the heart of the considerations. This can be done if EU citizenship status is the legal gateway to fundamental rights protection.

## **V. CONCLUSION**

This paper has addressed the question of whether there is a future for EU citizenship status and fundamental rights in light of four crises befalling the EU since the Lisbon Treaty – the Eurozone, migration & rule of law crises and the UK's withdrawal from the EU. Setting out the original trajectory of EU citizenship status, it was argued that the status had gained prominence and substance because of the fundamental rights discourse that it became the legal gateway for. As such, a mutually reinforcing relationship is offered as the appropriate avenue going forward for the future of EU citizenship status, for the case law has shown that there is room for fundamental rights to play more of a central role. This paper demonstrated how and why this is possible, and argued that it should be the future of EU citizenship status. Whilst perhaps previously it may have seemed as though there was a different trajectory for EU citizenship in light of the difficulties of the Eurozone and migration crises, as the EU faced its rule of law crises and Brexit, there is some indication perhaps of a renewed sense of solidarity of values. These values, which accord with fundamental rights protection, can and should be protected through the gateway of EU citizenship status. It is this, it has been argued, which should be their future in the EU.